

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

LONNIE LEE BANARK,

Case No. 2:16-CV-2555 JCM (GWF)

## ORDER

V.

JAMES DZURENDA, et al.,

Defendant(s).

Presently before the court is defendants Nathan Hughes (“Hughes”) and Holly Skulstad’s (“Skulstad”) (collectively, “defendants”) motion for summary judgment. (ECF No. 53). Plaintiff Lonnie Banark (“plaintiff”) filed a response (ECF No. 55), to which defendants replied<sup>1</sup> (ECF No. 56).

## I. Background

The parties are already familiar with the underlying facts of this § 1983 prisoner's civil rights action. *See* (ECF No. 16). Therefore, the court need not recite them again herein. However, the court will describe, in relevant detail, the procedural history that has led to the instant motion.

Plaintiff initiated this action in federal court on November 3, 2016. (ECF No. 1). On October 17, 2017, the court entered a screening order allowing plaintiff to file an amended complaint. (ECF No. 16). On the same day, the court filed plaintiff's first amended complaint, which asserted three causes of action against various defendants for (1) violation of the Eighth Amendment (cruel and unusual punishment and deliberate medical indifference); (2) retaliation

<sup>1</sup> Defendants also filed a supplemental brief to their motion. (ECF No. 58).

1 in violation of the First Amendment; and (3) a request for a “replacement social security card.”  
2 (ECF No. 17).

3 On November 28, 2018, Magistrate Judge Foley entered an order specifying that this  
4 action would proceed against defendants Thomas, Hughes, and Skulstad on plaintiff’s second  
5 claim for retaliation, pursuant to the court’s previous screening order. (ECF No. 18).

6 On July 25, 2018, defendants filed the instant motion for summary judgment, which the  
7 court will now address. (ECF No. 53).

8 **II. Legal Standard**

9 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,  
10 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
11 any, show that “there is no genuine dispute as to any material fact and the movant is entitled to a  
12 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment  
13 is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S.  
14 317, 323–24 (1986).

15 For purposes of summary judgment, disputed factual issues should be construed in favor  
16 of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to  
17 be entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts  
18 showing that there is a genuine issue for trial.” *Id.*

19 In determining summary judgment, a court applies a burden-shifting analysis. The  
20 moving party must first satisfy its initial burden. “When the party moving for summary  
21 judgment would bear the burden of proof at trial, it must come forward with evidence which  
22 would entitle it to a directed verdict if the evidence went uncontested at trial. In such a case,  
23 the moving party has the initial burden of establishing the absence of a genuine issue of fact on  
24 each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d  
25 474, 480 (9th Cir. 2000) (citations omitted).

26 By contrast, when the nonmoving party bears the burden of proving the claim or defense,  
27 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an  
28 essential element of the non-moving party’s case; or (2) by demonstrating that the nonmoving

1 party failed to make a showing sufficient to establish an element essential to that party's case on  
2 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If  
3 the moving party fails to meet its initial burden, summary judgment must be denied and the court  
4 need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S.  
5 144, 159–60 (1970).

6 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
7 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
8 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
9 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
10 that "the claimed factual dispute be shown to require a jury or judge to resolve the parties'  
11 differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*,  
12 809 F.2d 626, 631 (9th Cir. 1987).

13 In other words, the nonmoving party cannot avoid summary judgment by relying solely  
14 on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d  
15 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and  
16 allegations of the pleadings and set forth specific facts by producing competent evidence that  
17 shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

18 At summary judgment, a court's function is not to weigh the evidence and determine the  
19 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby*,  
20 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all  
21 justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the  
22 nonmoving party is merely colorable or is not significantly probative, summary judgment may be  
23 granted. *See id.* at 249–50.

24 **III. Discussion**

25 Defendants argue that they are entitled to summary judgment because plaintiff failed to  
26 exhaust his administrative remedies, as required by the Prison Litigation Reform Act ("PLRA").  
27 (ECF No. 53 at 4–5).

28

1        The PLRA provides that “[n]o action shall be brought with respect to prison conditions  
2 under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail,  
3 prison, or other correctional facility until such administrative remedies as are available are  
4 exhausted.” 42 U.S.C. § 1997e(a). An inmate must exhaust his administrative remedies  
5 irrespective of the forms of relief sought and offered through administrative avenues. *Booth v.*  
6 *Churner*, 532 U.S. 731, 741 (2001).

7        Failure to exhaust administrative remedies is ““an affirmative defense the defendant must  
8 plead and prove.”” *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v. Bock*,  
9 549 U.S. 199, 204 (2007)). Unless the failure to exhaust is clear from the face of the complaint,  
10 the defense must be raised in a motion for summary judgment. *See id.* (overruling in part *Wyatt*  
11 *v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003)). “If undisputed evidence viewed in the light  
12 most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary  
13 judgment under Rule 56. If material facts are disputed, summary judgment should be denied,  
14 and the district judge rather than a jury should determine the facts [in a preliminary proceeding].”  
15 *Id.* at 1168, 1170–71 (citations omitted).

16        “Exhaustion should be decided, if feasible, before reaching the merits of a prisoner’s  
17 claim. If discovery is appropriate, the district court may in its discretion limit discovery to  
18 evidence concerning exhaustion, leaving until later—if it becomes necessary—discovery related  
19 to the merits of the suit.” *Id.* at 1170 (citing *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008)).  
20 Where a defendant shows that the plaintiff failed to exhaust available administrative remedies,  
21 the burden shifts to the plaintiff “to come forward with evidence showing that there is something  
22 in his particular case that made the existing and generally available administrative remedies  
23 effectively unavailable to him.” *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 778  
24 n.5 (9th Cir. 1996)).

25        Here, defendants argue (and plaintiff does not dispute) that plaintiff has failed to take full  
26 advantage of the Nevada Department of Corrections’ (“NDOC”) grievance policy with respect to  
27 his retaliation claim, and therefore his sole remaining claim must be dismissed for failure to  
28

1 exhaust. (ECF No. 53); *see* (ECF No. 55). Specifically, defendants describe the NDOC inmate  
2 grievance procedure as follows:

3 Inmates incarcerated within NDOC institutions may grieve “conditions of  
4 institutional life” pursuant to AR 740. *See* Exhibit D (Administrative Regulation  
5 740). Ordinarily, the NDOC grievance process begins at the informal level. If the  
6 inmate is unable to resolve the issue through discussion with an institutional  
7 caseworker, *see* AR 740.04, the inmate is to file an informal grievance “[w]ithin  
8 six (6) months if the issue involves personal property damages or loss, personal  
9 injury, medical claims or any other tort claims, including civil rights claims[,]”  
10 AR 740.05(4). An inmate who is dissatisfied with the informal response may  
11 appeal to the first formal level within five days. AR 740.05(12). At the first  
12 formal level, officials of a higher level respond. *See* AR 740.06(1). The inmate  
13 also “shall provide a signed, sworn declaration of facts that form the basis for a  
14 claim that the informal response is correct. Any additional relevant documentation  
15 should be attached at this level.” AR 740.06(2). Within five days of a  
16 dissatisfactory first-level response, the inmate may appeal to the formal second  
17 level, which is subject to still-higher review. *See* AR 740.07(1).

18 (ECF No. 53 at 5–6). *See also* (ECF No. 58-1).

19 The court finds that defendants describe the applicable inmate grievance procedures  
20 accurately, with the exception that an inmate must file an informal grievance “[w]ithin *one (1)*  
21 *month* if the issue involves personal property damages or loss, personal injury, medical claims or  
22 any other tort claims, including civil rights claims,” rather than “six (6) months,” as defendants  
23 suggest. (ECF No. 58-1 at 7) (emphasis added). *See* (ECF No. 53 at 5).

24 Nevertheless, defendants note that, according to NDOC grievance history records,  
25 plaintiff has “only grieved the [retaliation] issue to the first level, and after their denials never  
26 proceeded to the second levels as required.” *Id.* at 6. The court finds that plaintiff’s inmate  
27 grievance history (ECF No. 53-5) supports defendants’ argument, and indeed plaintiff does not  
28 dispute this assertion. *See id*; (ECF No. 55).

29 Accordingly, the court finds that plaintiff has failed to exhaust his administrative  
30 remedies and must therefore grant defendants’ motion for summary judgment. *See Albino*, 747  
31 F.3d at 1168, 1170-71.

32 **IV. Conclusion**

33 Accordingly,

34 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants Hughes and  
35 Skulstad’s motion for summary judgment (ECF No. 53) be, and the same hereby is, GRANTED.

1 The clerk of court is instructed to enter judgment accordingly and close the case.

2 DATED December 20, 2018.

3   
4 UNITED STATES DISTRICT JUDGE

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28